Supreme Court, U.S.
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No. 00-

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2000

CLIFFORD ALEXANDER, ET AL.,

Appellants,

v.

WILLIAM M. DALEY, ET AL.,

Appellees.

ON APPEAL FROM THE U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Is Article I, § 2, of the Constitution properly construed to divest U.S. citizens resident in the nation's capital of voting representation in the House of Representatives, and can such an interpretation be harmonized with subsequent amendments to the Constitution and this Court's decisions establishing the right to vote as the central attribute of national citizenship?

PARTIES TO THE PROCEEDING

Appellants are fifty-four U.S. citizens resident in the District of Columbia—Clifford Alexander, Clinton Allen, Mary Ellen Arnold, Percy Battle, Wesley Brown, Andrew Bryant, Bonnie Cain, William Calbert, Oswald Cameron, Richard Carr, Dwight Cropp, Edward Eckenhoff, George Gibbs, Sr., A. Janelle Goetcheus, Michele Hagans, John Hechinger, Dorothy Height, Jehu Hunter, O.V. Johnson, Brenda Jones, Richard Jones, Kenneth Katz, Joan Kennan, Marguerite Kelly, Patricia King, Joyce A. Ladner, Debra L. Lee, Robert Low, Anna Marsh, David McDonald, Richard Moe, Luci Murphy, Brenda S. Nixon, Vincent E. Reed, Brenda Lee Richardson, Clyde Richardson, Don E. Robinson, Albert J. Schmidt, Kathryn J. Schmidt, Betty Smalls, Lloyd D. Smith, Miles S. Steele, III, Henry Strong, H. Patrick Swygert, Hector Torres, Stephen Joel Trachtenberg, Walter Washington, Frank H.F. White, Roger Wilkins, Eddie N. Williams, Ray Wilson, Joseph Wood, Willie V. Wood, and Elizabeth Yancey—and the District of Columbia, on behalf of itself and the approximately 500,000 citizens of the District of Columbia not individually represented. All appellants were plaintiffs below.

Appellees, defendants below, are: William M. Daley, as Secretary of Commerce; Jeff Trandahl, as Clerk of the United States House of Representatives; Wilson Livingood, as Sergeant-at-Arms of the U.S. House of Representatives; Gary Sisco, as Secretary of the United States Senate; and Gregory S. Casey, as Senate Sergeant-at-Arms and Doorkeeper of the U.S. Senate.

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JURISDICTIONAL STATEMENT

Our Declaration of Independence proclaims that governments "deriv[e] their just Powers from the consent of the Governed" and therefore that the "Right of Representation in the Legislature" is "a right inestimable" to the United States of America and one "formidable to tyrants only." Decl. of Independence, para. 2. Reflecting the primacy of these principles, the very first Article of the Constitution that cemented the union of "We, the People of the United States" promised a House of Representatives that would be elected for and by "the People of the several States." Art. I, § 2[1].

Nearly two centuries later, Article I's right to vote for congressional representation was established as the bedrock principle of our Constitution. No paraphrase can do justice to this Court's monumental holding in *Wesberry v. Sanders* that that provision must be interpreted to mean "one person, one vote" because "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." 376 U.S. 1, 17 (1964). "Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right." *Id.*

As a result of this Court's and this country's commitment to the principles enunciated in *Wesberry*, almost every barrier to the Constitution's promise of universal suffrage has now been removed, with one conspicuous and indefensible exception. The 500,000 people of the United States who happen to reside in the nation's capital are denied voting representation in the Congress, and have been since 1801, when Congress accepted the cession of land for the District of Columbia from the State of Maryland and Commonwealth of Virginia. This denial of the franchise is more injurious for these citizens than it would be for any other group of Americans, because Congress not only is their

national legislature but, by virtue of Article I, § 8[17], is their ultimate local legislature as well.

Two years ago, fifty-four individuals residing in the District of Columbia, as well as the District of Columbia itself, brought this suit before a three-judge district court seeking to establish and vindicate the rights of citizens of the District of Columbia to be represented in Congress under Article I, § 2, and the guarantees of the Fifth and Fourteenth Amendments. A two-judge majority, over the dissent of their colleague, acknowledged the "justice of plaintiffs' cause" but held that "longstanding judicial precedent, as well as the Constitution's text and history" left it without authority to grant any relief.

Appellants submit this jurisdictional statement to demonstrate that this appeal from the decision of the three-judge court presents a substantial question affecting a fundamental right of over half a million District residents. The question presented calls for this Court's plenary consideration, including, if necessary, a re-consideration or clarification of those cases that the district court believed barred it from recognizing the right of citizens of the District of Columbia to participate fully in the democratic processes established by our Constitution.

OPINIONS BELOW

The majority and dissenting opinions of the three-judge Court are reported at 90 F. Supp. 2d 35 and are reprinted in the accompanying Appendix ("App.") at 1a and 74a.

JURISDICTION

The three-judge district court issued its Memorandum Opinion and Order on March 20, 2000. The opinion rendered a final judgment denying appellants' claims that the failure to apportion members of the House of Representatives to the District of Columbia violated their constitutional rights. A notice of appeal to this Court from the decision of the three-

judge court was filed in the District Court and served on all parties on May 18, 2000. App. 167a. This Court has jurisdiction under 28 U.S.C. § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I of the Constitution provides in relevant part:

> Section 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . .
>
> . . . .
>
> Section 8. The Congress shall have Power . . . [17] To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; . . . .

The Fifth Amendment to the Constitution provides in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

The Fourteenth Amendment to the Constitution provides in relevant part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge

the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 28 U.S.C. § 2284 provides in relevant part:

(a) A district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.

STATEMENT OF THE CASE

On September 14, 1998, appellants filed a complaint in the U.S. District Court for the District of Columbia challenging the constitutionality of their exclusion and that of over a half million residents of the District of Columbia from congressional elections. App. 172a. The complaint alleged that the residents of the District possess a constitutional right to vote in congressional elections that is protected both by Article I and by subsequent constitutional amendments that guarantee to every American the equal protection of the laws, due process of law, the privileges and immunities of national citizenship, and a republican form of government. Based on these constitutional provisions, appellants alleged that the defendants—the Secretary of Commerce and certain House and Senate officials—had unlawfully excluded the District and its residents from the apportionment of congressional districts and from participating in the election of Members of Congress.

Because the action challenged the constitutionality of the exclusion of District of Columbia residents from the process of apportioning seats in the House of Representatives, appellants applied for a three-judge court under 28 U.S.C.

§ 2284. On November 6, 1998, the district court issued a memorandum opinion requesting appointment of a three-judge court. App. 157a.[1]

Shortly thereafter, appellants moved for summary judgment and asked the district court to declare the constitutional right of U.S. citizens residing in the nation's capital to participate in congressional elections, to order the defendant Secretary of Commerce and the defendant officers of the House of Representatives to account for District citizens in the apportionment of seats in the House of Representatives, and to defer further action for a reasonable period of time to give Congress the first opportunity to choose among the potential remedies. Secretary Daley and the House and Senate Defendants separately opposed the motion and filed motions to dismiss.

On March 20, 2000, the divided court issued a decision dismissing appellants' claims that they had been unconstitutionally excluded from the congressional apportionment process for the House of Representatives.[2] Before addressing the merits, the three-judge court unanimously rejected the defendants' contention that the

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[1] The case was consolidated with *Adams v. Clinton*, No. 98-1665, on November 3, 1998.

[2] All other claims, including appellants' claim to a right to participate in the election of members of the Senate, were remanded to the single-judge court because they fell "outside the jurisdictional mandate of section 2284(a)" and the three-judge court declined to exercise supplemental jurisdiction over them. App. 4a-5a. The single-judge court issued a separate opinion declining to reach the Senate claims on the ground that plaintiffs lacked standing, App. 143a, and that decision has been separately appealed to the U.S. Court of Appeals for the D.C. Circuit. The only issue appealed to this Court involves the holding of the three-judge court that appellants do not have a right to voting representation in the House of Representatives.

complaint raised a nonjusticiable political question, holding that the issue was a purely legal one which "the courts are perfectly capable of resolving," and noting this Court's repeated declarations that " 'constitutional challenges to apportionment are justiciable.' " App. 7a, *quoting Franklin v. Massachusetts*, 505 U.S. 788, 801 & n.2 (1992) (plurality opinion of O'Connor, J.) (citing *Department of Commerce v. Montana*, 503 U.S. 442 (1992)); accord *Wesberry*, 376 U.S. at 6.

The court also unanimously concluded that appellants had standing to press their suit. The court held that appellants' lack of representation in the House was an "injury in fact" and that (if appellants were correct that the Constitution entitled them to vote for House representation) the defendants' failure to include District residents in the congressional apportionment was the cause of that injury. App. 8a-10a. The district court also held that the injury was redressable because a "judgment directing the Secretary of Commerce to report the population of the states in a specified way would directly affect the apportionment of the House, either because the President would voluntarily abide by it or because the President had no choice but to abide by it." App. 13a; *see Franklin*, 505 U.S. at 802-03 (opinion of O'Connor, J.); *id.* at 808-17 (opinion of Stevens, J.). In reaching this conclusion, the court noted that "[h]ere, as in *Franklin*, neither the President nor the House officials have suggested that they would refuse to follow a decision of this Court . . . regarding the apportionment of congressional districts." App. 14a.

On the merits, two members of the district court interpreted Article I, § 2, to exclude U.S. citizens living in the District of Columbia from counting as "People of the several States" for purposes of the apportionment of congressional representatives. App. 25a. The majority concluded that its interpretation of the constitutional text was supported by available historical evidence and by language from this Court of very early vintage which the majority believed endorsed the view that residents of the District of Columbia did not have a

right to representation in Congress. App. 38a. Specifically, the majority cited language from *Hepburn & Dundas v. Ellzey*, 6 U.S. (2 Cranch) 445 (1805), which concluded that the District was not a "State" for purposes of federal court Article III jurisdiction, and *Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317 (1820), which determined that the federal government had the power to tax District residents despite their lack of representation in Congress, a holding that was later repeated in *Heald v. District of Columbia*, 259 U.S. 114 (1922).

In response to appellants' argument that this Court has subsequently treated residents of the District as residents of a "State" for other constitutional purposes and that application of *Wesberry* and other voting rights cases called for the same result here, the two-judge majority stated that "[i]t is for the Supreme Court, not us, to proclaim error in its past rulings, or their erosion by its adjudications since." App. 38a, *quoting Breakefield v. District of Columbia*, 442 F.2d 1227, 1229-30 (D.C. Cir. 1970).

The majority also held that residents of the District did not enjoy a "residual" citizenship in the State of Maryland that would permit them to participate in Maryland's congressional elections. The majority relied in large part on this Court's decision in *Albaugh v. Tawes*, 379 U.S. 27 (1964), which summarily affirmed a decision barring District residents from voting in Maryland's elections for the United States Senate. App. 56a. The majority acknowledged a "tension" between the *Albaugh* decision and *Evans v. Cornman*, 398 U.S. 419 (1970), which struck down as unconstitutional a Maryland requirement preventing persons living on the grounds of the National Institute of Health, a federal enclave, from voting in state and federal elections. Nonetheless, the majority held, "[w]e must apply the law as it now stands and, until the Supreme Court instructs otherwise, that law is set forth in *Albaugh*." App. 57a.

Having concluded that the original interpretation of Article I, however oblique, was to deprive residents of the

nation's capital from voting representation in the House of Representatives, the majority refused to consider whether that interpretation should still hold in light of later amendments to the Constitution further confirming and establishing the right to vote through the guarantees of equal protection, due process, and the privileges and immunities of national citizenship.

Judge Oberdorfer dissented. While recognizing that "ever since 1801, it has been assumed by some, but never authoritatively decided, that District inhabitants have no right to apportionment and to vote for voting representation in the House of Representatives," he believed that, in light of the centrality of the asserted right, "it behooves the judiciary to test thoroughly any purported necessity for such a practice and the assumptions underlying it." App. 76a, 77a. He then parsed the language from this Court's early cases relied upon by the majority and decided that those precedents did not "necessitate a conclusion that by using the word 'States' in Article I or in drafting any other provisions of the Constitution in 1787 the Framers intended to deny to the inhabitants of the yet-to-be-selected Seat of Government the right to vote for voting representation in the House of Representatives." App. 118a; *see also id.* at 120a. Had that been the framers' intent, he reasoned, they surely would have said so explicitly. *Id.*

Rather, Judge Oberdorfer explained, at the time the Constitution was written, all U.S. citizens lived in States, and Article I's reference to "the people of the several States" was therefore the most practical means available of assuring that *all* citizens would be represented. App. 108a (citing *U.S. Term Limits, Inc. v. Thornton,* 514 U.S. 779, 803 (1995)). He observed that construing the word "States" as intentionally excluding citizens from voting representation once the national capital was created would serve "no policy purpose" at all. App. 107a. And he concluded that any doubt whether the framers intended to deny residents of the capital voting representation should be resolved by looking to the "fundamental democratic principles upon which this Nation

was founded." App. 120a (citing *Powell v. McCormack*, 395 U.S. 486, 547 (1969); *U.S. Term Limits*, 514 U.S. at 819-23). The dissent therefore concluded that Article I should be construed to give the residents of the District of Columbia a constitutional right to voting representation in the House of Representatives. "There is no dispute that voting by the people and the existence of a representative democracy are inextricably linked. One simply cannot exist without the other." App. 122a.

The dissent also found that the defendants had not offered any compelling governmental interest that would justify depriving the citizens of the District of the right to congressional representation. Among other things, Judge Oberdorfer noted that U.S. citizens living in federal enclaves and those living overseas are entitled to vote for Members of Congress, even though none is the resident of a "State" in the ordinary sense of the term. App. 134a-138a. He therefore concluded that denying citizens living in the nation's capital the right to voting representation on the ground that they were not residents of a "State" was also a denial of equal protection. App. 139a.

THE QUESTION PRESENTED IS SUBSTANTIAL

The question whether United States citizens residing in the nation's capital can justly continue to be deprived of any voting representation in Congress is of the highest order. Even the majority below stated that "plaintiffs' grievances are serious" and that it was "not blind to the inequity of the situation plaintiffs seek to change." App. 2a, 70a. As it acknowledged, "many courts have found a contradiction between the democratic ideals upon which this country is founded and the exclusion of District residents from congressional representation." App. 70a. Judge Oberdorfer's dissent powerfully illustrates that reasonable minds can and do differ as to whether that contradiction must be resolved in the manner chosen by the two judges in the majority below.

District residents pay the national government's taxes, serve in its Armed Forces, and fight in its wars, but they are denied any vote in the Congress that levies these taxes and declares these wars. District residents are also subject to special "local" laws that apply in the District alone, enacted by a Congress that is totally unaccountable to the District citizenry. A vivid example is provided by the appropriations riders enacted in 1998 and 1999 prohibiting the Corporation Counsel or any other official of the District of Columbia from spending District funds to pursue this litigation. *See* Omnibus Appropriations Act of 1998, Pub. L. 105-277, § 151, 112 Stat. 2681; Consolidated Appropriations Act of 1999, Pub. L. 106-113, § 146, 113 Stat. 1501, 1523. The District of Columbia is thus the glaring "anomaly in our system of government, where the law makers are chosen by others than those for whom they make the laws."[3]

Nothing in the Constitution dictates this result. There is no provision denying U.S. citizens resident in the nation's capital the right to be counted as "People of the several States" for purposes of congressional representation. To the contrary, the early residents of the District were among "we the people" who ratified the Constitution, and the notion that any part of that magnificent compact was intended to take away the right of representation upon which the new country had staked its claim to the future should be unthinkable. That the disenfranchisement of District residents became accepted as the prevailing orthodoxy is a matter of historical accident, perhaps even acquiescence, but not constitutional necessity.

The majority below believed that its restrictive reading of the phrase "People of the several States" as excluding residents of the nation's capital was compelled by "longstanding judicial precedent, as well as the Constitution's text and history." As we show below, each of these premises

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[3] President John Tyler, *quoted in* James Hugh Reely, *Democracy or Despotism in the Nation's Capital* 58 (1939).

raises substantial questions and should receive plenary consideration by this Court.

A. Only This Court Can Resolve the Conflict Between The Dicta In Its Early Cases, Which the District Court Believed Controlling, And The Court's Subsequent Cases Recognizing The Right To Vote As The Central Attribute of National Citizenship.

The district court majority repeatedly stated that it was compelled to interpret Article I's reference to the election of representatives by "the people of the several States" as excluding citizens residing in the nation's capital because of prior statements from this Court. Specifically, the majority believed itself constrained by: (1) a holding in 1805 that the reference to a "State" in Article III did not include the District of Columbia, *see Hepburn & Dundas*, 6 U.S. (2 Cranch) at 452; (2) a 180-year old observation, irrelevant to the holding of the case, that the inhabitants of the District are "a part of the society . . . which has voluntarily relinquished the right of representation, and has adopted the whole body of Congress for its legitimate government," *see Loughborough*, 18 U.S. at 324 ; and (3) a page and a half summary affirmance of a 1964 decision denying District residents a right to vote in Maryland's Senate elections, *see Albaugh*, 379 U.S. at 27. As Judge Oberdorfer pointed out, none of these cases squarely addressed the voting rights of D.C. citizens under Article I, and predate the Court's decisions recognizing the right to vote as the fundamental bulwark of our constitutional democracy. App. 95a-100a. Nonetheless, the majority clearly believed its hands were tied. *See* App. 38a ("It is for the Supreme Court, not us, to proclaim error in its past rulings, or their erosion by its adjudications since."); App. 57a ("We must apply the law as it now stands and, until the Supreme Court instructs otherwise, that law is set forth in *Albaugh*.")

The citizens of the District of Columbia, denied the right to voting representation in Congress for over 200 years,

deserve to have this Court *directly* and *fully* consider whether their disenfranchisement is consistent with all relevant principles of American constitutional democracy. It is not enough that the status of citizens living in the District may have been obliquely mentioned in dicta in the early nineteenth century. Today's disenfranchisement of hundred of thousands of Americans must be considered in light of the country's evolution towards universal suffrage in the twentieth century, an evolution that reflects this Court's willingness to confront its own precedents and to re-evaluate the meaning of citizenship under our Constitution.

Although the constitutional framework for universal suffrage was laid with the ratification of the Reconstruction Era amendments, this Court did not begin to give those amendments real-life meaning until 1915, when it struck down an Oklahoma "grandfather clause" under which prospective voters had to pass examinations on the state constitution unless their ancestors had voted in an election prior to 1866. *Guinn and Beal v. United States*, 238 U.S. 347 (1915), represented an about-face from the deference that the Court had shown to similar facially non-discriminatory laws in *Giles v. Harris*, 189 U.S. 475 (1903), and *Williams v. Mississippi*, 170 U.S. 213 (1898). In *Smith v. Allwright*, 321 U.S. 649 (1944), this Court reversed its decision only nine years earlier in *Grovey v. Townsend*, 295 U.S. 45 (1935), and struck down a Texas Democratic Party rule forbidding non-whites from voting in the party primary as a violation of the Fourteenth Amendment's equal protection guarantee.

In the 1960s, this Court continued to revisit its prior opinions upholding restrictions on the franchise, and the protection of voting rights emerged as one of the bedrocks of constitutional interpretation. A critical breakthrough came in 1964, when the Court established the constitutional principle of "one person, one vote," and applied it to strike down congressional and state election districts made up of unequal numbers of people. *See Wesberry*, *supra*; *Reynolds v. Sims*, 377 U.S. 533 (1964). *Wesberry* struck down malapportioned

congressional districts in Georgia under Article I, § 2, reversing the Court's decision seventeen years earlier that congressional apportionment claims were non-justiciable. *See Colegrove v. Green*, 329 U.S. 828 (1946). *Reynolds* struck down an unequal apportionment of the Alabama state legislature under the equal protection clause, and ultimately led to the wholesale reapportionment of dozens of state legislatures. Both decisions placed decisive emphasis on the vital importance of the right to vote in our representatives democracy.

Following on the heels of *Wesberry* and *Reynolds*, the Court vindicated the principle of "one person, one vote" by striking down a succession of other impediments on the right to vote. Between 1965 and 1972, the Court invalidated, as contrary to constitutional principles, franchise restrictions based on military service, constitutional interpretation tests, poll taxes, property requirements, residence on a federal enclave, and durational residency requirements. *See Carrington v. Rash*, 380 U.S. 89 (1965) (military service); *Louisiana v. United States*, 380 U.S. 145 (1965) (test of constitutional interpretation); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (poll tax in state elections);[4] *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969) (property and bachelorhood); *Cipriano v. City of Houma*, 395 U.S. 701 (1969) (property taxpayer requirement for voting in bond election); *Evans v. Cornman*, *supra* (residence in federal enclave); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (one-year durational residency requirement).

In large part due to this Court's decisions, the founding ideal of government by "the consent of the governed" has become a reality for all Americans in the United States proper, except for the citizenry of the nation's capital. Plenary consideration by this Court is necessary to consider whether

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[4] The decision in *Harper* overruled the Court's decision fifteen years earlier in *Butler v. Thompson*, 341 U.S. 937 (1951).

the restrictive reading of Article I adopted by the district court in apparent deference to nineteenth century dicta is faithful to the principle that "[o]ur Constitution *leaves no room* for classification of people in a way that unnecessarily abridges" the precious right to have a voice in the election of those who govern us. *Wesberry*, 376 U.S. at 17 (emphasis added).

B. The Constitutional Text and History Do Not Compel The Interpretation That Citizens Residing in the National Capital Are Denied The Right to Congressional Representation.

No article or amendment of the Constitution expressly divests or deprives U.S. citizens resident in the District of Columbia of the right to representation in the House of Representatives. Article I, § 2, simply provides that the "House of Representatives shall be composed of Members chosen every second Year by the People of the several States" and a separate provision, in Article I, § 8, specifies that the federal government may be located in a District created "by Cession of particular States, and the Acceptance of Congress." In the opinion below, the two-judge majority held that the negative inference of these two provisions was that residents of the nation's capital are not among the "People of the several States" entitled to representation in the legislature that governs them.

That conclusion cannot be reconciled with the many decisions in which this Court has rejected the most literal reading of a constitutional provision in favor of one that is more harmonious with the principles enunciated by the document as a whole and in keeping with its underlying purposes. A few examples should suffice: In construing the scope of the Eleventh Amendment, the Court has held that the Amendment prohibits suits by a State's own citizens even though its *literal* text applies only to suits "by Citizens of another State, or by Citizens or Subjects of any Foreign State," and also encompasses certain suits in admiralty, even though the *literal* text refers solely to suits "in law or equity." *See, e.g., Hans v. Louisiana*, 134 U.S. 1 (1890); *Principality of*

Monaco v. Mississippi, 292 U.S. 313, 322 (1934). Similarly, although the First Amendment *literally* provides only that "*Congress* shall make no law . . . abridging the freedom of speech," the Court has long recognized that freedom of speech and of the press are protected from impairment by the States as well. *See, e.g., Gitlow v. People of New York*, 268 U.S. 652, 666 (1925). Likewise, the fact that the *actual text* of the Fifth Amendment does not contain a specific equal protection guarantee applicable to the federal government was no barrier to this Court's conclusion that the scope of that Amendment's due process protections were broad enough to prohibit racial segregation in D.C. public schools. *See Bolling v. Sharpe*, 347 U.S. 497, 500 (1954). The *Bolling* Court unanimously construed the Fifth Amendment guarantees against certain federal action to take on new meaning in light of the Fourteenth Amendment's subsequent guarantees against certain state action, because it was "unthinkable that the . . . Constitution would impose a lesser duty on the Federal Government" than on the States. *Id.*

Even more relevant, this Court has recognized that "[w]hether the District of Columbia constitutes a 'State' . . . within the meaning of any particular statutory or constitutional provision depends upon the character and aim of the specific provision involved." *District of Columbia v. Carter*, 409 U.S. 418, 420 (1973). This Court has repeatedly treated the residents of the District as residents of a "State" where necessary to assure that they are afforded the same constitutional rights and privileges as other U.S. citizens. Thus, the Court has held that Article III's reference to federal court jurisdiction over cases "between Citizens of different States" does not bar Congress from conferring diversity jurisdiction in cases brought by a District resident. *See National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949). The District has also been treated as a State for purposes of the Sixth Amendment's guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed[.]" *See*

Callan v. Wilson, 127 U.S. 540 (1888); *Clawans v. District of Columbia*, 300 U.S. 617 (1937); *District of Columbia v. Colts*, 282 U.S. 63 (1930). Finally, the Court has held that the "courts of the district are bound, equally with courts of the states, to observe the command of the full faith and credit clause, wherever applicable," even though that clause *literally* applies only to each "State." *See Loughran v. Loughran*, 292 U.S. 216, 228 (1934).

The common theme in these cases is that residents of the nation's capital should be treated as residents of a State where necessary to avoid what would otherwise be an inexplicable gap in the constitutional fabric that would deprive District citizens of important rights that the framers could not have intended to deny them. As Justice Rutledge wrote in his concurrence in the *Tidewater* case:

> [W]e should not blink the fact that, whatever the need for federal jurisdiction over suits between litigant citizens of the several states, the same need equally compels the safeguards of federal trial for suits brought by citizens of the District of Columbia against citizens of the several states.
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> ***
>
> I cannot believe that the Framers intended to impose so purposeless and indefensible a discrimination, although they may have been guilty of understandable oversight in not providing explicitly against it.

337 U.S. at 623, 625; *see also Bolling*, 345 U.S. at 500.

Nor does history reveal any original intent to discriminate against District residents by disenfranchising them in the circumstances presented here. At the time the Constitution was adopted, the framers had agreed to the formation of a national capital district, but had not agreed on the site of the new capital. Although the "District Clause" in

Article I, § 8 provided that the capital district would be subject to the exclusive control of Congress, that clause did not provide that District citizens would be disenfranchised in congressional elections. The purpose of the Clause was not to disenfranchise these Americans, but rather to assure the security and independence of the fledgling national government against potential threats or manipulation by state governments. Security concerns dominated the debates on the creation of a national capital to the exclusion of attention to the rights of the future residents of the capital, including rights of suffrage.[5] As one commentator observed:

> "It cannot be overemphasized that throughout the debates regarding the selection of the site and the adoption of the District clause, the desire for an area free from state control was paramount. . . . At no time during the prolonged debate [on the creation of a capital district] was there any mention of the effect upon the franchise of the then residents by the cessions and the acceptance by Congress of the ceded territory. . . ." Roy P. Franchino, *The Constitutionality of Home Rule and National Representation for the District of Columbia*, 46 Geo. L.J. 207, 213-14 (1957-58).

After several years of bargaining over the site of the new capital, Congress settled on a portion of land on the Potomac River. The relatively few residents of these lands were citizens of Virginia and Maryland at the time, eligible to vote in congressional elections to the same extent as other residents of those States.

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[5] *See* Kenneth R. Bowling, The Creation of Washington, D.C.: The Idea and Location of the American Capital (1991); Peter Raven-Hansen, *Congressional Representation for the District of Columbia*, 12 Harv. J. on Legis. 167, 169-72, 184-85 (1975).

Significantly, these individuals did not stop voting in congressional elections when the District of Columbia was created. The District came into being in 1790, when the federal government enacted a statute accepting the cession of the District lands.[6] The acceptance statute provided, however, that the national capital would not be relocated to the District of Columbia until 1800, and that the laws of Maryland and Virginia would continue to have force in the newly-created federal District in the interim. Eligible District residents continued to vote in their former States during this period. This extraterritorial voting ended only in February of 1801, when Congress first actively asserted its jurisdiction over the District of Columbia.[7] At that time, Maryland and Virginia laws ceased to enforce their laws in the District, and District residents ceased to vote in Maryland or Virginia elections.[8]

As of 1800, there were only 14,288 residents of the District—far fewer than the 30,000 residents that the Constitution established as the smallest permissible Congressional District. *See* U.S. Const., Art. I, § 2 (setting minimum district size of 30,000). Thus, although the disenfranchisement of the District may not have been perceived as an egregious misreading of our Constitution

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[6] An Act for establishing the temporary and permanent seat of the Government of the United States, ch. 28, 1 Stat. 130 (1790).

[7] An Act concerning the District of Columbia, ch. 15, 2 Stat. 103 (1801).

[8] *See* Raven-Hansen, *supra*, at 174-77. Virginia and Maryland law at the time required ownership of real property and residence in the county where the citizen proposed to vote as a pre-requisite to voting. *See* William Tindall, Origin and Government of the District of Columbia 17-18 (1908). After Maryland and Virginia law ceased to apply in the District, those requirements appeared to make District citizens ineligible to vote in Maryland and Virginia, and they ceased to vote in national elections after February of 1801.

when it occurred, it clearly has become one now that the District of Columbia is home to over half a million Americans.

Especially in the absence of any indication that the founders intended to disenfranchise the residents of a District that would grow in size to equal or exceed the population of some States,[9] the district court's restrictive reading of Article I as necessarily and forever excluding District inhabitants from congressional representation does not do justice to this Court's long line of cases that endeavor to make sense of the Constitution as a whole. *See supra* 14-16. The Constitution should not be read "'with the narrow literalism of a municipal code or a penal statute, but so that its high purposes should illumine every sentence and phrase of the document and be given effect as part of a harmonious framework of government.'" *Tidewater*, 337 U.S. at 618 n. 11 (Rutledge, J., concurring). Moreover, "it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence," with its guarantee of the inalienable right of self-government. *Gulf, Colorado & Santa Fe Ry. Co. v. Ellis*, 165 U.S. 150, 160 (1897).

The court below erred when it failed to follow these principles of constitutional interpretation and refused to consider alternative constructions of Article I, § 2. It was open to the court, for example, to construe Article I, § 2, to allow District citizens to vote in congressional elections by treating the District as if it were a "State" for purposes of that provision. As the court below recognized, the word "state" in the Constitution does not inherently mean one of the fifty States only, and its meaning in any particular constitutional provision depends on the full context in which it appears. *See* App. 19a; *see also District of Columbia v. Carter*, 409 U.S. 418, 420 (1973). Here, the overriding contextual circumstance is the fact that District citizens' most fundamental rights are at

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[9] The population of the District of Columbia is larger than that of Wyoming and close to that of Vermont.

stake and no compelling rationale has been offered why the framers would have intended to deny them those rights. Unless District residents are permitted to vote in congressional elections, they will be denied any vote in the body that serves as their national and state legislature and will be rendered unequal and inferior to their peers in the fifty States.

Alternatively, for the limited purpose of vindicating their constitutional right to vote in congressional elections, District residents could be deemed to retain a residual citizenship in Maryland—the State from which the modern-day District of Columbia was created. As Judge Oberdorfer so powerfully explained, the cession legislation that created the national capital was and is incapable of taking away the constitutional rights of District residents. App. 95a-100a; *see, e.g., O'Donoghue v. United States*, 289 U.S. 516, 541 (1933). Although the cession legislation may take away District residents' Maryland citizenship for most purposes, it has no power to strip them of their constitutional right to vote in congressional elections, nor to strip them of their state citizenship to the extent that that citizenship is inextricably linked to rights of national citizenship. District residents living here today thus have the same right to vote in congressional elections that they would have if the cession statutes had not cut off their Maryland citizenship for general purposes. Any other conclusion would be incompatible with the democratic principles that the Constitution was adopted to secure.

These alternative readings of Article I, § 2, have ample precedent. Americans who live overseas, in federal enclaves, or on tribal lands all have voting representation in Congress, which confirms that the reference to election by the "People of the several States" can and has been construed other than literally where necessary to preserve the fundamental principles of our constitutional democracy. These practices also confirm that, in providing for voting by the "People of the several States," the Constitution does not make States the *source* of congressional voting rights, but simply used States

as the means of distributing rights that belonged to the people. As this Court recently observed, the Constitution is built on the "critical postulate that sovereignty is vested in the people, and that sovereignty confers on the people the right to choose freely their representatives to the National Government." *U.S. Term Limits*, 514 U.S. at 794. Thus, "the right to choose representatives belongs not to the States, but to the people." *Id.* at 820-21.

C. Article I, § 2, Must Be Construed In Harmony With Subsequent Constitutional Amendments Establishing the Right to Vote As The Pillar of Our Constitutional Democracy.

As noted, the opinion below fails to analyze the Constitution as a whole, in its present form, and with due regard for the central importance of the right to vote in our constitutional scheme. Whatever the court below believed to be the original effect of Article I, § 2, it failed to make the further inquiry whether its interpretation should be modified in light of subsequent amendments to the Constitution that established the right to vote as a fundamental attribute of U.S. citizenship. That right is inherent in and protected by the guarantees that every American citizen in this country is entitled to the equal protection of the laws, due process of law, and the privileges and immunities of national citizenship.

1. The Fourteenth Amendment to the Constitution forbids each State to "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, § 1. The Fifth Amendment due process clause applicable to the District of Columbia extends the same guarantee of equal protection against the federal government. *See Buckley v. Valeo*, 424 U.S. 1, 93 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment"); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) (Fifth Amendment equal protection claims are treated "precisely the same" as those made under the Fourteenth Amendment). Under the equal protection principles guaranteed by these amendments, governmental

classifications that selectively distribute the right to vote are subject to the strictest constitutional scrutiny. *See Dunn*, 405 U.S. at 337; *Phoenix v. Kolodziejski*, 399 U.S. 204, 205 (1970); *Cipriano*, 395 U.S. at 704.

The robust protection accorded the right to vote under the equal protection clause flows from this Court's recognition that voting is one of our most fundamental rights. "Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry*, 376 U.S. at 17-18. Anyone deprived of the franchise is therefore rendered inherently unequal to his or her fellow citizens. Justice Blackmun forcefully explained this reasoning in *Plyler v. Doe*:

> "[T]he right to vote is accorded extraordinary treatment because it is, in equal protection terms, an extraordinary right: a citizen cannot hope to achieve any meaningful degree of individual political equality if granted an inferior right of participation in the political process. Those denied the vote are relegated, by state fiat, in a most basic way to second-class status." *Plyler v. Doe*, 457 U.S. 202, 233 (1982) (Blackmun, J., concurring).

In *Wesberry* and *Reynolds*, this Court distilled the protections due the right to vote under the equal protection clause into a single phrase: "one person, one vote." That principle reflects the inestimable importance of the right to vote in securing political equality in our democracy. It also reflects the command of the equal protection clause that citizens with an equal stake in a legislature's decisions should have "an equally effective voice in the election of members of [that] legislature." *Board of Estimate v. Morris*, 489 U.S. 688, 693 (1989). And it reflects the self-evident truth that our government derives its legitimacy from the consent of "the whole people" subject to its laws. *U.S. Term Limits*, 514 U.S. at 839 (Kennedy, J., concurring).

The equal protection guarantee does not tolerate discrimination based on place of residence. In striking down malapportioned state election districts, this Court in *Reynolds* observed that "the weight of a citizen's vote cannot be made to depend on where he lives." 377 U.S. at 567. "Legislators represent people, not trees or acres." *Id.* at 562. They are "elected by voters, not farms or cities or economic interests." *Id.* The voting rights of citizens thus depend on whether they will be *governed* by the results of an election, and not on "where they happen to reside." *Id.* at 563. "Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race or economic status." *Id.* at 566.

These equal protection principles apply foursquare to the citizens of the District of Columbia. Their consent to their government is just as important as the consent of other Americans. They are subject to the same burdens of citizenship as their peers in the fifty States. And they have an even greater stake in congressional elections than do other Americans, because Congress functions both as the national and state legislature in the District. District citizens thus have "an inalienable right to full and effective participation in the political processes of legislative bodies of the Nation, State, or locality as the case may be[.]" *Reynolds*, 377 U.S. at 565.

In addition to rendering District citizens constitutionally unequal to the residents of the fifty States, their disenfranchisement also renders them unequal to millions of Americans who reside on thousands of federal enclaves in the United States, including military bases, forts, national parks, and national research facilities. Although Congress may "exercise like Authority" over enclaves as it does the District of Columbia—both are created by the same constitutional clause—this Court has recognized that enclave residents have a constitutional right to vote in federal and state elections in the States from which the enclave was created. *See Evans v. Cornman*, *supra*. District citizens have at least

as great a stake in elections to Congress, which governs them both as a national and state legislature. Equal protection therefore requires that District citizens, too, be permitted to vote in congressional elections. Any other result would deny these citizens constitutional equality with their peers in the States and with millions of Americans residing on federal enclaves.

2. The right to vote in congressional elections is also protected by the Fifth Amendment guarantee that no person shall be "deprived of life, liberty, or property without due process of law." U.S. Const., amend. V. That clause places certain fundamental liberties beyond the government's power to curtail no matter what procedures it follows. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702, 764 & n.17 (1997). Fundamental liberties protected from government encroachment are those that are "deeply rooted in our history and traditions" or "'implicit in the concept of ordered liberty.'" *Id.* at 721; *see also Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833, 951 (Rehnquist, C.J., concurring and dissenting) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325-26 1937)).

It is hard to conceive of a right more firmly anchored in our traditions or more deeply ingrained in the concept of "ordered liberty" than a citizen's right to vote in elections to his or her national or state legislature. *See, e.g., Burson v. Freeman*, 504 U.S. 191, 198 (1992) (the right to vote is "a right at the heart of our democracy"); *Illinois St. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) ("we have often reiterated that voting is of the most fundamental significance under our constitutional structure."); *Reynolds*, 377 U.S. at 561-62 ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society.")

A comparison of the right to vote with other rights held to be implicit in the concept of ordered liberty confirms its place within that group. This Court has held, for example, that the right to trial by jury, the right to exclude illegally seized

evidence from criminal trials, and the right to confront opposing witnesses are so fundamental and essential to liberty that they are incorporated against the States by the due process clause of the Fourteenth Amendment. *See Duncan v. Louisiana*, 391 U.S. 145, 149, 155 (1968); *Pointer v. Texas*, 380 U.S. 400, 404 (1965); *Mapp v. Ohio*, 367 U.S. 643, 650, 655 (1961). The Court has also held that access to abortion is a fundamental right. *See Casey*, 505 U.S. at 846-52. While these are surely important rights, a number of democratic societies function without them. By contrast, no democracy functions without the right to vote, and no other democracy in the world precludes residents of its national capital from voting in elections to the national legislature. *See* CRS Report, *DC Statehood: The Historical Context and Recent Congressional Actions*, at 14 & n.44 (1994).

The denial of District citizens' right to vote in congressional elections also violates their Fifth Amendment right to procedural due process. The due process clause applies to *all* governmental deprivations of "life, liberty, or property," whether by judicial, executive, or legislative action. In the familiar judicial or administrative contexts, the process that is due is notice and a hearing prior to the deprivation. *See generally Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915). A different process is due, however, in the legislative context. When the government enacts legislation affecting a broad group of individuals, "it is impracticable that everyone should have a direct voice in its adoption." *Id.* Instead, those who are affected by legislation "are given notice and a hearing through their representatives, whose power is a direct manifestation of the citizens' consent." *Missouri v. Jenkins*, 495 U.S. 33, 66 (1990) (Kennedy, O'Connor, Scalia, JJ., and Rehnquist, C.J., concurring). In other words, the process required with respect to legislation "is not due process through individual hearings . . . but through elective representation, partisan politics, and the ultimate sovereignty of the people to vote out of office those legislators who are unfaithful to the public

will." *Rogin v. Bensalem Township*, 616 F.2d 680, 694 (3d Cir. 1980).[10]

Here, District citizens have been denied this most basic right. That denial undermines the fairness and legitimacy of legislative actions affecting their life, liberty, and property, just as would be the case if District citizens were denied notice and a hearing with regard to judicial or administrative actions. The simple fact is that, where a group of citizens is excluded from representation in their legislature, it contradicts the framers' core assumption that there will be "distinct and discernable lines of political accountability . . . between the citizens and the Federal Government." *United States v. Lopez*, 514 U.S. 549, 576 (1995). There can be no more fundamental violation of the process that is due American citizens under our Constitution.

3. The disenfranchisement of District citizens further denies them the most important of the constitutionally protected "privileges" of national citizenship. The Constitution protects those privileges of citizenship that "arise out of the nature and essential character of the National Government." *Twining v. New Jersey*, 211 U.S. 78, 97 (1908). Foremost among these rights of national citizenship is "the right to vote for national officers." *Id.*

The Fourteenth Amendment's guarantee protecting the "privileges and immunities" of national citizenship is "a limitation on the powers of the National Government as well as the States." *Saenz v. Roe*, 526 U.S. 489, 507 (1999); *see*

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[10] *See also Minnesota St. Bd. for Community Colleges v. Knight*, 465 U.S. 271, 285 (1984) (there is no first amendment or due process right to a hearing before the legislature because "[d]isagreement with public policy and disapproval of officials' responsiveness . . . is to be registered principally at the polls"); *Philly's v. Byrne*, 732 F.2d 87, 95 (7th Cir. 1984) (with respect to legislation, "the process due is found in the electorate's power over its chosen representatives") (Wood, J., concurring).

also U.S. Term Limits, 514 U.S. at 843 (noting that "federal citizenship in and of itself suffices for the assertion of rights under the Constitution"). As against the federal government, a privilege of national citizenship "does not depend upon any of the Amendments to the Constitution, but arises out of the creation and establishment by the Constitution itself of a national government, paramount and supreme within its sphere of action." *In re Quarles*, 158 U.S. 532, 536 (1895) (listing right to vote as such a privilege of citizenship).

The right to vote in national elections arguably did not rank as a privilege of national citizenship prior to 1868, before the Fourteenth Amendment was adopted and when a majority of Americans lacked the right to vote in national elections. *See Minor v. Happersett*, 88 U.S. 162 (1874) (rejecting claim that women had a constitutional right to vote under the privileges or immunities clause). But it has surely become such a privilege today, when nearly all American adults possess that basic right. *Cf. Reynolds*, 377 U.S. at 612 (Harlan, J., dissenting) (noting de facto overruling of *Minor v. Happersett*). The constitutional transformation that has taken place in this century demonstrates that the right to vote is a core attribute of citizenship. As this Court recognized in *Reynolds*, "To the extent that a citizens' right to vote is debased, he is that much less a citizen." 377 U.S. at 567. "The right to vote for national officers" is thus a vital "privilege and immunity of national citizenship." *Oregon v. Mitchell*, 400 U.S. 112, 277 (1970) (Douglas, J., concurring); *see also U.S. Term Limits*, 514 U.S. at 838-45 (Kennedy, J., concurring); *United States v. Classic*, 313 U.S. 299, 315 (1941); *Twining*, 211 U.S. at 97.

Congress expressly invoked its power to enforce the "privileges" of national citizenship secured by the Fourteenth Amendment when it enacted the Overseas Citizens Voting Rights Act of 1975, 89 Stat. 1142 (1975), which secured the rights of millions of American citizens living overseas to vote in federal elections. The House Report on that legislation declares: "the right to vote for national officers is an inherent

right and privilege of national citizenship, and . . . Congress retains the power to protect this right and privilege under [section V of] the 14th amendment." H.R. No. 94-649 Part I at p.5 (December 19, 1975).

Privileges of citizenship that arise solely from the "relationship between the people of the Nation and their National government," *U.S. Term Limits,* 514 U.S. at 845, can have little meaning if they do not protect citizens' most critical link to that government: the privilege of voting for representatives in Congress. A State may not impair its citizens' privileges of national citizenship by restricting their right to vote for the congressional representatives of their choice. *Id.* at 844-45. The defendants here have violated the same constitutional privilege by denying the right of District residents to congressional representation.

In sum, the decision of the court below that Article I, § 2, must be rigidly construed such that the equal protection rights, due process rights, and privileges and immunities of U.S. citizens become immeasurably lessened at the border of the nation's capital is not faithful to the principles upon which this country was founded, its history of and commitment to removing barriers to universal suffrage, and this Court's precedents interpreting the Constitution as a document whose textual provisions must be construed in harmony with each other. To the extent that the majority felt itself constrained by prior language from this Court's decisions, we respectfully suggest that it is incumbent upon this Court to directly and fully consider the issue. Especially because we have been deprived of a representative vote by the actions of the executive and legislative branches of government, this Court should note probable jurisdiction and grant plenary consideration. We the People of the District of Columbia deserve no less.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

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